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No. 87-204

In the Supreme Court of the United States

OCTOBER TERM, 1987

EXPLOSIVES CORPORATION OF AMERICA,
GENERAL INSURANCE COMPANY OF AMERICA,
ROCKCOR, INC.,
PETITIONERS,

v.

GARLAM ENTERPRISES CORPORATION AND
FEDERAL INSURANCE COMPANY, INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly substituted, pursuant to Rule 25(c), Fed.R.Civ.P., a wholly-owned subsidiary for its holding company as the real party in interest when:

a) the holding company contractually agreed to be bound by the acts of its subsidiary;

b) the holding company dissolved its subsidiary without notification to respondent, a statutory creditor, and transferred *all* of the subsidiary's assets, including all interest in this litigation, to itself; and

c) the holding company financed and controlled this litigation, in the name of its dissolved subsidiary, to defend and protect its own interest without proper and timely notice to the court or to respondent.

2. Should this Court review the unanimous decision of the Court of Appeals which affirmed the district court's award of damages when there is no conflict between the circuits or with a decision of this Court, and the case is nationally insignificant.

II

THE PARTIES

Respondent is Garlam Enterprises Corporation ("Garlam"). Federal Insurance Company, Inc. has not been a party to the appeal nor does it have any interest in the present dispute.

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RESPONDENT'S BRIEF IN OPPOSITION

Restatement of the Case

I. NATURE OF THE CASE

This is a contract dispute case wherein respondent, Garlam, proved to the courts below that Explosives Corporation of America ("Explo")[1] breached its contract commitments and caused Garlam damages in excess of 2.4 million dollars.

[1] In 1973, Explo was merged with an entity known as Excoa, Inc. ("Excoa") which assumed all its debts and liabilities. In 1976 Excoa was "liquidated and dissolved" and all its assets conveyed to Rocket Research Corporation, now known as Rockcor, Inc. ("Rockcor"). The district court was never notified of the Explo-Excoa merger nor of Excoa's dissolution until after entry of judgment on the liability issue.

II. Restatement of Facts

A. *Introduction*

Petitioners present a series of "undisputed facts" in support of their allegation to the effect that the Court of Appeals erred in substituting Explo for its holding company, Rockcor. Petitioner belabors that the *only* reason the non-existent subsidiary was substituted for its holding company (Rockcor) was because the latter financed and controlled this litigation. However, the true facts, as established by the courts below, present a different scenario.

The dispute between Garlam and Explo commenced over fifteen years ago. In January 1972, after breaching its contract with Garlam, Explo egregiously sued Garlam in the United States District Court for the District of Puerto Rico (Civil No. 72-0001) alleging breach of contract. Garlam counterclaimed against Explo and its surety, General Insurance Company of America ("GICA"), for Explo's breach and willful non-compliance with the contract. (A. 58-63).[2]

By agreement between the parties, the case was bifurcated (A. 68) wherein the issue of liability was tried on January 26-30, 1976 before Judge W. A. Bootle, Senior U.S. District Court Judge sitting by designation. On March 30, 1977, judgment on the liability issue was entered by Judge Bootle holding that Explo had breached its contract with Garlam and:

> "...that the real reason for abandonment of the project by Explo was not any breach or failure of performance on the part of Garlam, but was Explo's decision to abandon what for it was proving to be an unprofitable contract." (A. 1482-1500).

Accordingly, judgment was entered against Explo and its surety, GICA, on the issue of liability; damages were to be proven at a later trial (A. 1500).

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[2] Page references to the 7-volume Appendix used before the Court of Appeals are cited "A. __." Page references to the Appendix contained in the instant petition are cited as "__a".

The parties stipulated that the issue of damages was to be referred to a Special Master (A. 1560-1564). After reviewing all the relevant evidence and holding an evidentiary hearing, on April 24, 1980 the Special Master found that Garlam sustained $2,423,177 in damages caused by Explo's breach (A. 1879-1896). On November 16, 1982, the district court entered judgment in favor of Garlam and against Explo and its surety in the sum of $2,423,177. In that judgment, the liability of Explo's surety, GICA, was fixed at the policy limits of $1,230,000 (252 n.1a.).

B. *The Propriety of Substitution*

The Garlam-Explo contract reads in its pertinent parts:

> " ARTICLE XX — BINDING OF HEIRS, EXECUTORS, ADMINISTRATORS, SUCCESSORS AND HOLDING COMPANIES."
>
> "It is mutually agreed that this agreement shall bind the heirs, executors, administrators, *successors*, *holding companies* and *assigns* of the parties hereto." (emphasis added) (A. 4019).

On the first page of the Garlam-Explo contract Explo called itself:

> "...Explo contractors, a division of Explosives Corporation of America which in turn is a subsidiary of Rocket Research Corporation, hereinafter referred to as subcontractor...".

According to the testimony of Dr. Sutherland (Chief Executive Officer of Rockcor and Explo/Excoa) the Garlam-Explo contract was negotiated in Puerto Rico by Hugo E. Oswald and John W. Goode (A. 3250-51). Mr. Goode signed the Garlam-Explo contract in Puerto Rico before a notary public on May 5, 1971 (A. 4019). At that time, Mr. Oswald was a lawyer, a director and officer of both Rockcor and Explo

(A. 3251). In 1971 when the Garlam-Explo contract was signed, Rockcor owned 92% of the Explo stock (A. 3245), and Explo had six (6) directors and officers of which four (4) were also directors and officers of Rockcor (A. 3249, 3254). In 1973 Rockcor organized Excoa with the purpose of merging it with Explo and gaining full (100%) control over Explo (A. 3256). Thereafter, overlapping directors continued until Rockcor caused Explo/Excoa's dissolution in 1976 (A. 3256).

Garlam at all times insisted as a condition to the Garlam-Explo contract that it was to bind Rockcor, the holding company of Explo. From the inception of the contract, indeed even before the signing of the contract, Rockor knew of the existence of the contract, and the Rockcor Board of Directors expressly acted upon the terms of the contract by securing and guaranteeing a $1.2 million dollar performance bond so that Explo could commence work in Puerto Rico (A. 3267). An indemnity agreement was also signed in 1971 between Rockcor and Explo's surety covering the Garlam-Explo contract which surety remains in force to this day (A. 3268).

Over ten (10) years ago, in 1976, upon causing the dissolution of its wholly-owned subsidiary (Explo/Excoa) without notice to the court or to respondents, Rockcor secured all interest in and to this lawsuit. The exact wording on the Bill of Sale is:

> "*All* of party of the first parts [sic] (Excoa's) interest in and to that lawsuit pending in the United States District Court, the District of Puerto Rico being Cause No. 1-72 entitled Explosives Corporation and Federal Insurance Company, General Insurance Company of North America, third party defendant." (emphasis added).

It is emphasized that the assignment of all of Excoa's (Explo's) interest in this lawsuit and its subsequent dissolution was never made known to the court or to Garlam until after entry of judgment on the liability issue. Moreover, the Bill of Sale surfaced after 1983 when Garlam was authorized by the

court to conduct post-judgment discovery on the issue of a Rule 25(c) substitution. The assignment does *NOT* exclude the Garlam counterclaim. Indeed, Rockcor's Chairman of the Board, Dr. Sutherland, admitted that Rockcor was aware of Garlam's counterclaim since its inception (A. 3261), and further admitted that Rockcor's attorney, Stuart G. Oles, had been representing Explo even before the commencement of this lawsuit. Rockcor also filed yearly status reports of the litigation with the Securities Exchange Commission. Dr. Sutherland further admitted that after the Explo-Excoa merger, Mr. Oles continued representing Explo while he simultaneously represented Rockcor during the various "special appearances" before the district court. The same attorney (Mr. Oles) also represents the surety, GICA (A. 3261), and now represents Rockcor in this Court.

Rockcor was well aware that upon accepting an assignment of *all* interest in this lawsuit it was exposing itself to also accepting the Garlam counterclaim. After Rockcor caused the dissolution of Explo/Excoa in 1976, Rockcor began paying all litigation expenses even before the entry of any adverse judgment against Explo. Thus, since Rockcor received all of Excoa's assets after its dissolution, the only interest Explo/ Excoa had in defending the Garlam counterclaim was to protect Rockcor's interest as guarantor of Explo's 1.2 million dollar performance bond.

Notwithstanding, petitioners allege that when Rockcor acquired from Explo/Excoa *all* interest in and to this lawsuit, it only agreed to accept the beneficial aspect of same, i.e., if Explo was successful in its claim, Rockcor would receive the payment of damages; but if Explo was unsuccessful in its defense Explo would pay nothing because it was a dissolved corporation. Succinctly stated, Rockcor played the "heads I win, tails you lose game" with the lower courts. The Court of Appeals unanimously rejected petitioners' attempts, finding that "litigation is a two-way street. Once it is entered it must be travelled the full length;. . ." (60a).

In view of the aforestated facts and the applicable legal principles discussed *infra*, the Court of Appeals for the First Circuit found that substitution was proper under Rule 25(c), Fed.R.Civ.P. In its opinion, the Court of Appeals stated that:

> "For the following reasons, we hold that Rockcor is liable for the full amount of the judgment against Explo and must be substituted for Explo as the defendant to Garlam's counterclaim: Rockcor from the beginning was the controlling stockholder of Explo/Excoa; it succeeded to Explo/Excoa's interest in the lawsuit; after the merger of Explo into Excoa and Excoa's dissolution, Rockcor became the real party in interest, indeed the only party in interest; Rockcor financed andcontrolled the litigation; and Rockcor is bound under the contract between Explo and Garlam as Explo's successor and a holding company of Explo." (59-60a.)

C. *Damages Were Correctly Awarded by the Courts Below.*

The courts below found that Explo's failure to perform its contract commitments or its abandonment of the project was not justified.[3] As a result of Explo's breach and willful non-compliance with the Garlam-Explo contract, petitioners were charged, according to the express conditions of the contract (A. 4010-11), with the costs and damages sustained by respondent in completing the work Explo had agreed to perform.[4]

The Court of Appeals, following the decision of the district court, rejected petitioners' allegation to the effect that the Garlam-Explo contract entitled them to equitable renegotia-

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[3] Petitioners flagrantly misstate that Explo was terminated. However, it was clearly proven and established by the district court and adopted by the Court of Appeals, that Explo abandoned what for it was proving to be an unprofitable contract.

[4] The Garlam-Explo contract estimated that the quantity of rock to be blasted at 2 million cubic meters, *subject to overruns and underruns* (A. 4016).

tion of unit prices for rock blasting. The Court of Appeals correctly pierced through petitioners' attempt to interchange or merge the provisions of two totally independent and unrelated contracts in support of its allegation, and found that:

> "Explo seems to argue that it had a right of renegotiation of unit prices if the actual work quantities differed substantially from the Highway Authority's estimate. There was, however, no such provision in Explo's contract and the district court's ruling was correct. Moreover, there was no evidence before the district court that Explo's production was affected in any way by the work quantity estimates of the Highway Authority. The difficulties between Explo and Garlam stemmed from three factors: oversize rock fragments, low quantity of material blasted, and the slow work progress." (17a)

The provisions of the Highway Authority-Garlam contract *only* affected Explo insofar as they prescribed the work to be done and the time of performance (A. 217).

The Court of Appeals further rejected petitioners' argument that it was charged for completing a materially larger contract than that previously agreed upon. The Court of Appeals concurred with the district court's decision to the effect that the Special Master, to whom the parties had referred the issue of damages,:

> "... applied the correct legal principles in making his findings, which were supported by the evidence and not clearly erroneous. We rule specifically that Garlam carried its burden of proof on damages. There is no basis in the contract or the evidence for finding that Explo was entitled to an equitable price increase. Nor are we impressed with Explo's argument that Garlam failed to mitigate its damages and, hence, is precluded from recovering. This overlooks the fact that, after Explo breached its contract, Garlam was under time constraints

in its prime contract with the Highway Authority to complete the blasting within a comparatively short time.[4] The measure of damages was, as the district court found, the actual and necessary additional costs reasonably incurred by Garlam in order to complete the work required by Explo by the subcontract. The amount arrived at by the Master reflected accurately the application of this damages formula."

"[4] Explo had agreed to do the work by September 22, 1972" (22-23a).

Reasons for Denying the Writ

I. THE DECISION OF THE COURT OF APPEALS ORDERING THE SUBSTITUTION OF A WHOLLY-OWNED AND DISSOLVED SUBSIDIARY ("EXPLO") FOR ITS HOLDING COMPANY AND SUCCESSOR IN THIS LITIGATION ("ROCKCOR") AS THE REAL PARTY IN INTEREST, PURSUANT TO RULE 25(c), FED.R.CIV.P., DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT NOR WITH THE DECISIONS OF OTHER CIRCUITS.

A. *The Court of Appeals Fully Considered and Correctly Decided the Issue of Substitution.*

The Court of Appeals found that Explo should properly be substituted for Rockcor as judgment debtor for the following reasons:

1. *Rockcor, as a Holding Company, Contractually Agreed To Be Bound by the Acts of Its Wholly Owned Subsidiary, Explo.*

It is undisputed that at the time the Garlam-Explo contract was executed, Rockcor owned almost all (92%) of Explo's outstanding stock, and controlled the Board of Directors of Explo by sitting four of its (Rockcor's) own directors on a six-man Explo board. Rockcor knew of the existence of the Garlam-Explo contract from its inception, and expressly acted

upon its terms by securing a 1.2 million dollar performance bond on behalf of Explo. Rockcor further signed an indemnity agreement with its surety guaranteeing Explo's performance.

This Court in *North American Company* v. *S.E.C.*, 327 U.S. 686, 701 (1946), defined a holding company as:

> "The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field enterprise."

See also General Foods v. *Mass. Dept. of Public Health*, 648 F.2d 784, 789 n.6 (1st Cir. 1981), citing with approval *Astron Industrial Associates* v. *Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968) for the proposition that a parent corporation with overlapping management can be bound by a subsidiary.

The Court of Appeals found it evident that Rockcor was a holding company of Explo at the time the contract was executed (59a). As such, Rockcor expressly agreed to be bound by the terms of the Garlam-Explo contract which was negotiated and signed in Puerto Rico by one of Rockcor's officers. (*See* relevant part of Article XX of the Garlam-Explo contract reproduced *supra* at page 3 wherein the parties agreed to bind "*holding companies*".) Rockcor accepted the Garlam-Explo contract, expressly acted upon it, and never objected to the aforementioned clause. Hence it was properly substituted as a judgment debtor because, as Explo/Excoa's holding company, it contractually agreed to be bound.

2. *Rockcor Is Liable to Respondent as a Successor Judgment Debtor.*

Petitioners acknowledge that there are four factual situations in which a corporation that purchases the assets of another corporation may be held liable for the debts or obligations of the transferor corporation; to wit: (a) when the pur-

chasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (b) when the transaction amounts to a consolidation or merger between the purchaser and seller corporations; (c) when the purchaser corporation is merely a continuation of the seller corporation; or (d) when the transaction is entered into fraudulently to escape liability for such obligations. *Cyr* v. *B. Offen & Company, Inc.*, 501 F.2d 1145 (1st Cir. 1974); *see also Golden State Bottling Company* v. *NLRB*, 414 U.S. 168, 182 n.5 (1973); *Dayton* v. *Peck, Stow & Wilco Co.*, 739 F.2d 690, 692 (1st Cir. 1984); *Gee* v. *Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980); *Leannais* v. *Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977); *R. J. Enstrom Corp.* v. *Interceptor Corp.*, 555 F.2d 277, 281-82 (10th Cir. 1977). (All cited with approval by petitioners at page 7n.6).

Hence, the purchaser of all the assets of a corporation can be liable if that purchaser, like Rockcor, falls into any of the above categories. For the following reasons, Rockcor falls into at least three (3) of the above factual situations:

a) *Rockcor Expressly Agreed To Accept All Interest in and to This Litigation.*

As previously stated, Rockcor secured from its wholly-owned subsidiary (Explo/Excoa) *ALL* interest (beneficial or adverse) in this lawsuit. (*See* Bill of Sale reproduced in the Restatement of Facts *supra* page 4). The assignment of "*ALL*" of Explo-Excoa's interest in this lawsuit to Rockcor was not notified to the court nor to respondent, a statutory creditor, until after entry of judgment on the issue of liability. Notwithstanding, the assignment did not exclude respondent's counterclaim. Before the entry of any adverse judgment against Explo, Rockcor was the sole owner of the Garlam-Explo dispute. Conversely, since Rockcor received **all** of Excoa's assets after its dissolution, the only interest Explo-Excoa had in defending the Garlam counterclaim was to protect Rockcor's interest (Rockcor was the bond guarantor) (A. 3315).

When substitution was first sought Rockcor had already succeeded to Explo/Excoa's interest to the suit, was financing the litigation, as discussed *infra*, and had agreed to indemnify the bonding company in the event of a judgment against Explo. (56a). The Explo-Garlam Contract, "Article XX" *supra* at page 3, likewise binds "assigns" and "successors". Rockcor cannot dispute that after it dissolved Explo/Excoa it was the successor to Explo/Excoa and under the Explo-Garlam contract (which it accepted without protest) it is bound to accept the judgment.

Hence, Explo was properly substituted by Rockcor because Rockcor succeeded Explo/Excoa in this litigation (and also to the assets from which respondent could satisfy the judgment rendered in its favor) (53a); *See Minnesota Mining and Manufacturing Co.* v. *Eco Chem, Inc.*, 757 F.2d 1256 (Fed. Cir. 1985).

The Court of Appeals correctly concluded that "after the merger of Explo into Excoa and Excoa's dissolution, Rockcor became the real party in interest, indeed the only party in interest". (59a).

b) *Rockcor Is Merely a Continuation of Its Subsidiary, Explo.*

By using Explo as a "front" in this lawsuit and by paying for all litigation costs even before any adverse judgment was entered, Rockcor became a continuation of Rockcor solely for the purpose of protecting its own interest as guarantor of the performance bond.

The Court of Appeals also found that the district court's focus of Rockcor as a separate entity from Explo/Excoa "was misdirected; it should have been on the relationship between Rockcor and Explo/Excoa and the role Rockcor played in the litigation." (49a). From that view, it is undisputed that in this litigation Rockcor continued as an active litigant against Garlam before and after it caused the Explo/Excoa dissolution.

c) *The Dissolution of Explo/Excoa and the Subsequent Transfer of All Assets to Rockcor Was Not Notified to Respondent, a Statutory Creditor.*

Although the Court of Appeals did not address this issue, the record shows that neither Explo/Excoa nor Rockcor ever bothered to notify respondent or respondent's attorneys of Excoa's dissolution, although they were all represented by the same attorneys.

Petitioners are all subject to the laws of the State of Washington with regard to corporate dissolution and the rights of creditors. Under the laws of the State of Washington, RCWA 19.40.010, a creditor is defined under the Fraudulent Conveyance Act as follows:

> "Creditor is a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Likewise, the same Washington statute defines a debt as follows:

> "Debt includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent."

Accordingly, at the time of the dissolution of Excoa, Rockcor knew, and had sufficient notice of the fact, that under the law respondent was a creditor, and that Excoa had a potential debt owed to respondent. Rockcor gave Garlam no opportunity to intervene in the dissolution process and protect its claim against Excoa prior to dissolution.

The "Notice to Creditors" (A. 3972) required by Washington State law, 23A.28.020 and 23A.28.040, was admittedly not notified to respondent (A. 3305). Such lack of notice by Excoa and Rockcor constitutes fraud, or at least, bad faith conduct.

Furthermore, Rockcor admits that at the time of dissolution no appraisal of the assets of Excoa was ever made (A. 3290) and that no independent Certified Public Accountant ever prepared a certified statement of the assets and liabilities of Excoa (A. 3325); certainly Rockcor cannot, in good faith, now claim that it gave "fair consideration" for the assets it received from Excoa since no independent entity ever certified the real liabilities, if any, Excoa had at the time of dissolution.

> "Determination of the issue of solvency, under the (Fraudulent Conveyance) statute, requires an appraisal of probable liabilities as well as the salable value of assets." *F. S. Bowen Elec. Company* v. *U.S. Fidelity & Guaranty Company*, 256 F.2d 46, 49 (4th Cir. 1958).

Such a transfer of assets to the sole shareholder of an insolvent corporation does not create a preference, nor is the sole shareholder considered a bonafide purchaser, *United States* v. *Adams Building Company*, 531 F.2d 342 (6th Cir. 1976).

This Court can glean from the above that the facts before the Court of Appeals were sufficient to hold that Rockcor's actions caused it to become a successor judgment debtor.

3. *Rockcor Directly Financed and Controlled This Litigation Before Any Adverse Judgment Was Entered.*

In its opinion, the Court of Appeals found still another ground for substitution since:

> "It has long been the rule that a nonparty who controls the litigation is bound by the judgment. 'The reason would be that the nonparty would have the power to determine what evidence and arguments should be offered in the litigation and, if appropriate, the appeal.' *General Foods Corporation* v. *Massachusetts Department of Public Health*, 648 F.2d 784, 789 (1st Cir. 1981). *See also Drier* v. *Tarpon Oil Company*, 522 F.2d 199 (5th Cir. 1975)

(president of corporation held liable because of privity and as a controlling person under 15 U.S.C. Section 77o [sic]; *Kreager* v. *General Electric Company*, 497 F.2d 468, 471 (2d Cir. [sic]) (sole shareholder of corporation bound by dismissal of first action brought in the name of his corporation), *cert. denied*, 419 U.S. 861 (1974); *Pan American Match, Inc.* v. *Sear, Roebuck & Co.*, 454 F.2d 871, 874 (1st Cir. [sic]) (subsidiary corporation sufficiently identified with its parent company to represent the legal rights of the parent), *cert. denied*, 409 U.S. 892 (1972); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice and Procedure* Section 0.411[10] at 477-78 (1984 & Supp. 1986-87)." (53-55a).

By Rockcor's own admission after it caused the Explo/Excoa dissolution it continued paying litigation expenses to protect its own interest (A. 3315). Thus it is amply clear that Rockcor assumed the costs and control of the litigation in order to protect its own interest, and *NOT* to benefit Explo/Excoa's interests.

Accordingly, this Court has noted that:

"[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own...is as much bound...as he would be if he had been a party to the record."

Montana v. *United States*, 440 U.S. 147, 154 (1979) (quoting *Souffront* v. *Compagnie des Sucries*, 217 U.S. 475, 486-87 (1910); *Alman* v. *Danin*, 801 F.2d 1 (1st Cir. 1986); (50-51a).

In light of the above findings of facts expressly established by the Court of Appeals, or which could otherwise easily be inferred from the record, the substitution of Explo (a wholly-owned and nonexistent subsidiary) for Rockcor (its holding company and successor in this litigation) was proper pursuant to Rule 25(c), Fed.R.Civ.P.

The decision of the Court of Appeals as to the issue of substitution, does *NOT* conflict with the case law cited by petitioners. To the contrary, respondent has cited the same case law in support of its own arguments.

Petitioners' allegations that the decision of the Court of Appeals conflicts with the decisions of this Court and other circuit courts lacks merit. Petitioners do not contest the legal principles or doctrines adopted by the Court of Appeals, but rather attempt to challenge the conclusions the Court of Appeals drew from the facts. The cases cited by Petitioners do *NOT* conflict with the Appellate Court's decision, and in fact support the opinion.

B. *The Issue of Substitution Lacks National Significance Sufficient To Warrant Review.*

Petitioners allege that the Court of Appeals erred in ordering that Explo be substituted for Rockcor (as shown above, the decision was correct). This Court has been reluctant to grant a writ of certiorari to review an allegedly erroneous decision because undue concentration on every error committed by the lower courts would transform the Supreme Court into another court of errors and/or appeals, contrary to its constitutional mission. *Ross* v. *Moffit*, 417 U.S. 600, 616-17 (1974).

Petitioners belabor that the only reason Rockcor was substituted as a judgment debtor was because it financed and controlled this litigation. Although such a finding is sufficient by itself to order substitution, the Court of Appeals clearly established that Rockcor's finance and control of this litigation was only one of the many facts present in favor of its finding that substitution was proper. (56-60a)

Certainly to the extent that a "correct" decision is a restatement of "settled law" (as in this case), review on certiorari becomes patently inappropriate. Petitioners have not shown a scintilla of evidence or cited any conflicting case law in support of its allegation to the effect that the decision of the Court

of Appeals departs from the accepted and usual course of proceedings, and thus, the present writ does not merit review. In addition, the facts in this case do not raise an issue of sufficient national significance to merit review by this Court.

Notwithstanding, petitioners attempt to devise an issue sufficient to merit review by speculating as to the "logical implications" the decision of the Court of Appeals may have in future cases regarding substitution. Neither the facts nor the applicable case law support petitioners' conclusory allegations.

II. PETITIONERS' ALLEGATION THAT DAMAGES WERE INCORRECTLY AWARDED ONLY INVOLVES A QUESTION OF EVIDENCE AND FACTUAL FINDINGS, AND THUS, DOES NOT MERIT REVIEW BY THIS COURT.

This issue has been adequately covered in this opposition and need not be repeated again (*see* pages 6 thru 8). Succinctly stated, the courts below awarded damages to respondent resulting from Explo's breach and willful noncompliance with the Garlam-Explo contract. Both courts soundly rejected petitioners' allegation to the effect that under the Garlam-Explo contract, Explo was entitled to renegotiation of unit prices for rock blasting (16-17a). The courts below further dismissed petitioners' allegations that they were charged with the costs of completing a materially larger contract than that previously agreed upon (22-23a). The award of damages to respondent was supported by the evidence.

Petitioners' challenge to the award of damages plainly seeks to abate the findings of fact established by the Special Master, the district court and reviewed and approved by the Court of Appeals. Nowhere do petitioners demonstrate any error, let alone clear error, the legal standard designed to reverse the award of the Special Master and the district court; Rule 52(a) Fed. R. Civ. P. The cases cited by petitioners are inapplicable or otherwise have no bearing on the determination of damages. Certainly, a well-reasoned award of damages based upon factual findings does not rise to the level of national importance nor does it merit review by this Court.

Conclusion

The decision of the Court of Appeals correctly substituted, pursuant to Rule 25(c), Fed.R.Civ.P., a wholly-owned and dissolved subsidiary (Explo/Excoa) for its holding company and successor in this litigation (Rockcor) as the real party in interest. Under the factual findings of this case, the Court of Appeals did not give Rule 25(c) a "unique" interpretation, nor does its decision to substitute conflict with any decision rendered by this Court or by other circuit courts of appeals.

Rockcor from the begining was the controlling stockholder of Explo/Excoa; it succeeded to the Explo/Excoa's interest in this lawsuit; after the merger of Explo into Excoa and Excoa's dissolution, Rockcor became the only party in interest; notice was not given to respondent, a statutory creditor, of Explo/Excoa's merger nor dissolution until after entry of judgment on the liability issue; Rockcor financed and controlled this litigation; and Rockcor is bound under the Garlam-Explo contract as Explo's successor and a holding company of Explo. Certainly, the cases cited by petitioners would mandate substitution under these findings of fact. Indeed, respondent relied upon the very same cases petitioners have cited as being contrary to the decision of the Court of Appeals. Thus, the decision of the Court of Appeals does not represent a departure from the accepted and usual course of judicial proceedings, nor does it conflict with the decisions of any other circuit.

Petitioners have been unable to raise an issue of sufficient national significance to merit review by this Court. The only issue petitioners raise is their unhappiness with the unanimous opinion of the Court of Appeals and the fact they will finally have to pay the damages resulting from their misconduct committed over fifteen (15) years ago. The Court of Appeals correctly followed the case law enunciated by this Court regarding substitution of a party in interest.

For all the aforesaid reasons, the petition for writ of certiorari to the United States Court of Appeals for the First Circuit should be DENIED.

Respectfully submitted,

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